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Supreme Court of the United States,

OCTOBER TERM, 1928.

No. 879.

HARRY C. MOORE, AS TREASURER OF GRANT COUNTY, INDIANA,
Petitioner,

against

SIDNEY Z. MITCHELL AND NIEL A. WEATHERS (SUED AS NEIL A. WEATHERS), AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF RICHARD EDWARDS BREED, DECEASED,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GRAHAM SUMNER,
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LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
on the brief.

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Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 879.

HARRY C. MOORE, as Treasurer of Grant County, Indiana,
Petitioner,

AGAINST

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (sued as Neil A. Weathers), as Executors of the Last Will and Testament of Richard Edwards Breed, deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioner seeks a review by this Court of the decision by the United States Circuit Court of Appeals for the Second Circuit, affirming an order of the District Court of the United States for the Southern District of New York

granting a motion made by the respondents to dismiss the complaint herein upon the ground that the complaint did not state a cause of action of which the Court would take jurisdiction (Tr. fol. 71). Opinions were rendered by Judge Knox in the District Court (Tr. fols. 73-81), and by the Circuit Court of Appeals (Tr. pp. 35-41).

The action was brought by the plaintiff as Treasurer of Grant County, Indiana, to recover the sum of $982,516.22, with interest, against the defendants as executors of the Last Will and Testament of Richard Edwards Breed, deceased, for personal taxes for the years 1903 to 1926, inclusive, alleged to have been assessed against the decedent after his death as a resident of Grant County, Indiana, by the taxing authorities of said County (Complaint, paragraphs VI and VII, Tr. fols. 32-47).

The District Court refused to act as a tax collector for the political subdivisions of Grant County, Indiana, and said in the course of its opinion:

> "As a result of what has been said, I do not conceive it to be the duty of this Court, notwithstanding the weight of insistence to the contrary, to undertake the enforcement within the State of New York, of the revenue laws of Indiana." (Tr. fol. 80.)

In the opinion of Judge Manton in the Circuit Court of Appeals, concurred in by Judge Augustus N. Hand, which affirmed the order of the District Court, it was said:

> "With the appellees and the property without the state, and the estate being administered in New York, the effort to collect a tax, for a political sub-division of Indiana, is repugnant to the settled principles of private international law which preclude one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The revenue laws of one state have no force in another. The taxing power of a state is, by the Federal Constitution, limited to persons and property within its jurisdiction. *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265." (Tr. p. 37.)

Judge Learned Hand, in a concurring opinion, said:

> "To pass upon the provisions for the public order of another State is, or at any rate, should be, beyond the powers of a court; it involves the relations between the States themselves with which courts have no power to deal and which are entrusted to other authorities. It may commit the domestic State to a position which would be of serious moment to the foreign State. Revenue laws fall within the same reasoning; they effect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper." (Tr. p. 41.)

The narrow question presented in this case in its present form is whether or not the attempt by the taxing authorities of Grant County, Indiana, to impose and assess taxes after the death of the decedent, where neither the respondents nor the assets of the decedent's estate were within the State of Indiana, created a liability which the Federal Court sitting in New York should and could enforce.

All of the decisions in which the question has been involved hold that the collection of taxes must be made within the territorial jurisdiction of the taxing sovereign, and the brief of the petitioner contains no cases in any court holding the contrary or which hold expressly or by necessary implication that the revenue laws of one state may be enforced in another jurisdiction. The reason for this absence of authority in support of petitioner's contention is suggested by Judge Knox in his opinion in the District Court, where he said:

> "There is, however, another consideration which strengthens my belief that the complaint should be dismissed. It is that plaintiff has not called attention to a single authoritative decision which, under circumstances such as are revealed by the present pleading, permitted the tax collecting officer of a political subdivision of one State, or the revenue authorities of such State, to go within the borders of another, and there

collect taxes from property that never was within the jurisdiction where the assessment was made, or from persons who were non-residents of the sovereignty which authorized such assessment. The inability of the plaintiff to point to some substantial authority in support of the proposition which he urged at the bar, and in his brief is due, I think, to the fact, as declared by the State Court of Appeals in the Harbeck case, that private international law

> 'precludes one State from acting as a collector of taxes for a sister State and from enforcing its penal or revenue laws as such',

it being

> 'universally recognized that the revenue laws of one State have no force in another'.

See *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, and *New York Trust Co.* v. *Island Oil & Transport Corp.*, 11 Fed. (2d) 698." (Tr. fols. 77-80.)

The petition and brief upon this application contain no sufficient reason for granting a review by this Court of the decision of the Circuit Court of Appeals. The decision of the Circuit Court of Appeals was in accordance with all of the authorities which have considered the question of extraterritorial collection of revenue, and those authorities are plainly based upon sound principles of private international law and public policy. The decision is not in any sense a decision on a question of federal law as contended by the petitioner and even if it were, the question has been authoritatively and properly settled in the higher federal courts. There is, therefore, no necessity for a review by this Court for the purpose of settling the question. The authorities are discussed under Point II of this brief.

It appears from the complaint (paragraph I, Tr. fols. 15-17) that the plaintiff is the Treasurer of Grant County, Indiana, and a citizen of Indiana, and that the defendant Sidney Z. Mitchell is a citizen of New York, and that the defendant Niel A. Weathers is a citizen of New Jersey. It

also appears from the complaint (paragraph III, Tr. fols. 18-19) that the defendants are not sued in their individual capacities, but as executors of the Last Will and Testament of Richard Edwards Breed, deceased, and that the defendants were qualified and appointed as such executors by the Surrogates' Court of the County of New York. The complaint does not allege that any of the decedent's property, referred to in paragraph IV (Tr. fols. 23-27), was ever physically within the State of Indiana, and similarly the complaint does not allege that the defendants were ever personally within the State of Indiana or that the decedent died there. The complaint alleges two causes of action, the first of which is based upon an alleged indebtedness of the decedent and the defendants as executors to Grant County, Indiana, and its political sub-divisions, for the taxes alleged to have been assessed against the decedent after his death, and the second of which is based upon an alleged unjust enrichment of the decedent and the defendants as executors by reason of the failure to pay such taxes. The complaint does not allege that any lien was imposed upon any of the property of the decedent by reason of any of the proceedings for the assessment of the taxes which are referred to in the complaint, or otherwise, and the plaintiff's effort is simply to enforce in this jurisdiction, against the defendants as executors, an alleged personal liability of the decedent for taxes which was not liquidated until after his death.

With reference to the concern expressed by the petitioner that the amount in controversy be paid to Grant County, it may be noted that the statute which purports to authorize the plaintiff to maintain this action, appearing in paragraph IX of the complaint (Tr. fol. 56), contains a provision for his compensation which is not set forth in the complaint. This statute, Indiana Session Laws of 1927, chapter 54, page 141, Section 1, contains the following provision:

> "* * * said treasurer, in his name as such officer, may, or whenever requested so to do by the board of county commissioners, shall, at any time after delin-

quency, institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside of the State of Indiana, or by his legal representatives, whenever either said treasurer or said board, as the case may be, determines a reasonable probability exists that the said delinquent taxes, or a substantial part thereof, can be collected in this or any other state by such suit or proceedings, *and for his services in so doing the said treasurer shall charge and receive twenty-five per centum of such money so collected:* * * *." (Italics ours.)

The respondents are executors of an estate which is in the process of administration in the Surrogates' Court of New York County and derive their powers from that Court. In that Court they would not be free to pay the petitioner's claim and they would not be required to pay the same because the Court of Appeals and the Surrogates' Court have held, in *State of Colorado* v. *Harbeck, infra*, and *Matter of Anita Bliss, infra*, respectively, that taxes due to another state cannot be collected in New York State and are not debts. It seems entirely proper, in the circumstances, that the Federal Court should refuse to take jurisdiction of the petitioner's complaint.

POINT I.

The action is brought to enforce a revenue law of the State of Indiana.

The District Court concluded that this was an action to recover taxes alleged to be due to the political sub-divisions of Grant County, Indiana. The Circuit Court of Appeals adopted this view. It appears from the complaint that both causes of action alleged therein are based upon the failure of the decedent and the respondents as executors of his estate to pay taxes alleged to be due to various political sub-divisions of the State of Indiana for the years 1903 to 1926, inclusive, assessed against the decedent after his death. None of the Indiana statutes pleaded in the complaint describes taxes as debts. In fact the only statute pleaded in the complaint, from which the petitioner claims the right to maintain the present action (Statutes of Indiana, 1927, Chapter 54, page 141, Section 1; Tr. fols. 56-57), contains the following provision:

> "* * * said treasurer, in his name as such officer, * * * shall * * * institute and prosecute to final judgment and execution, all suits and proceedings necessary *for the collection of delinquent taxes* owing by any person residing outside of the State of Indiana, or by his legal representatives, whenever either said treasurer or said board, as the case may be, determines a reasonable probability exists that the *said delinquent taxes*, * * * can be collected in this or any other state by such suit or proceedings * * *." (Italics ours.)

The petitioner attempts to maintain the present suit under the authority of that Section and that Section shows beyond any doubt that the action which that Section attempts to empower the treasurer to maintain is an action to collect delinquent taxes and not any imaginary "debt" or "personal liability".

While the complaint describes the alleged liability of the respondents as an "indebtedness", this description cannot obscure the real nature of the alleged liability. As the opinion in this case of Judge Manton in the Circuit Court of Appeals, said:

> "Taxes are imposts, not debts, collected for the support of the government. *Meriweather* v. *Garrett*, 102 U. S. 472. The form of procedure to collect them cannot change their character. Any contractual or quasi contractual obligation to pay arises out of the assessment. The enforcement of revenue laws rests not on consent, but on force and authority. *State of Colorado* v. *Harbeck*, 232 N. Y. 71. An action for debt cannot be maintained to collect a tax in the New York State Courts. *City of New York* v. *McLean*, 170 N. Y. 374; *Matter of Maltbie* v. *Lobsitz Mills Co.*, 223 N. Y. 227. See also, *City of Boston* v. *Turner*, 201 Mass. 190" (Tr. pp. 36-37).

POINT II.

The revenue laws of Indiana should not be enforced outside of the State of Indiana and the District Court properly refused to act as tax collector for the political sub-divisions of that State.

The plaintiff in this action seeks to obtain a judgment against the defendants as executors of the Last Will and Testament of Richard Edwards Breed, deceased, and to collect taxes alleged to be due to the plaintiff as Treasurer of Grant County, Indiana, out of the assets of the estate located in New York and subject to the jurisdiction of the Surrogates' Court of New York County, from which the defendants, as executors, received their authority to act. The complaint does not allege that any of the property of the decedent is or was, at any time, within the State of Indiana and in

paragraph IV of the complaint (Tr. fols. 19-28) it is alleged specifically that a substantial part of the property owned by the decedent during the years 1903 to 1926, inclusive, has come into the hands and under the control of the defendants as his executors "and the same is now held by them in the State of New York as part of the assets of his estate now in the course of administration" (Tr. fol. 28).

The plaintiff, therefore, is seeking to obtain a judgment for the collection of taxes due to political sub-divisions of the State of Indiana, although neither the defendants nor any of the property of the decedent is alleged to have been within that State at the time the tax was assessed and although the decedent, at that time, was dead. We submit that the employment of the Federal Court as a tax collector for one of the states, or the political sub-divisions thereof, is as repugnant to well settled principles of private international law as the collection of taxes due a state through the instrumentality of another state. Such was the conclusion of the District Court and the Circuit Court of Appeals in the present case.

Wherever the question has arisen, courts have held uniformly that taxes due to one sovereignty will not be enforced outside of the territorial jurisdiction of that sovereignty. While the question does not seem to have been passed upon squarely by this Court, this Court said, in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, at page 290:

> "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for *the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue*, or other municipal laws, and to all judgments, for such penalties." (Italics ours.)

In *Ashley* v. *Ryan*, 153 U. S. 436, this Court said, at page 440:

> "Nor does the determination of the Federal question render it necessary to define the nature of the charge imposed; for, whether this charge be viewed as a tax,

a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, or *involved the assertion of the right of a State to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction.*" (Italics ours.)

In *New York Trust Company* v. *Island Oil & Transport Corporation*, 11 F. (2d) 698, the Circuit Court of Appeals for the Second Circuit had occasion to pass upon a similar question. In that case the State of Virginia had assessed franchise taxes against a Virginia corporation for which receivers had been appointed by the District Court for the Southern District of New York. The receivers applied to the District Court for instructions as to whether or not they should pay the franchise taxes to the State of Virginia. Judge Knox authorized the payment of the taxes, and on appeal, the Circuit Court of Appeals affirmed the order, saying, at page 699:

"* * * if the receivers in the exercise of their business discretion deem it expedient to pay this tax, they are authorized so to do; but they are not required to do it, because the State of Virginia has no legal right to demand payment from them."

In discussing the question as to whether or not the State of Virginia was entitled to the taxes as a matter of law, the Circuit Court of Appeals said, at page 699:

"If, however, in this suit and in the State of New York, Virginia had appeared and demanded payment, we think it could not have recovered.

"Undoubtedly Virginia can go on taxing its own corporation as long as that corporation exists; but its right to recover against any property must rest either upon its sovereign power or upon statutes passed in pursuance thereof. But neither its sovereignty nor its statutes has any extraterritorial vigor."

The question has been passed upon squarely by the Court of Appeals of the State of New York in *State of Colorado* v.

Harbeck, 232 N. Y. 71. In that case the State of Colorado sought to recover an inheritance tax upon the estate of a resident of Boulder, Colorada, who had died in the City of New York. His will and codicils thereto were admitted to probate in the Surrogates' Court of New York County and letters testamentary thereunder were duly issued. Transfer tax proceedings were had in New York. No provision was made for the payment of a transfer tax to the State of Colorado. Thereafter, the State of Colorado attempted to assess taxes upon the estate as the estate of a resident of Colorado, and took the proceedings authorized by the Colorado statute. No part of the decedent's estate was physically present in Colorado at the time of his death or thereafter, and none of the defendants appeared in the Colorado proceedings or was a resident of Colorado. The Court of Appeals affirmed a judgment dismissing the complaint, and said, at page 83:

> "Although a liability to pay the tax exists under the Colorado statute, jurisdiction and power to enforce the liability in the New York tribunal must be established. Under the due process clause of the United States Constitution, where the delinquents are non-residents of the taxing state and outside its jurisdiction, so that no personal liability or enforcible duty may be established as against them and where the property involved is without the taxing state so that no *res* exists upon which the taxing state may impose a lien, the state is powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenue. (*Pennoyer* v. *Neff,* 95 U. S. 714; *Dewey* v. *Des Moines,* 173 U. S. 193; *City of New York* v. *McLean,* 170 N. Y. 374, 387, 388; *Matter of Maltbie* v. *Lobsitz Mills Co.,* 223 N. Y. 227.)
>
> "But plaintiff contends that by the application of a familiar fiction of law the legal situs of decedent's personal property attaches to his domicile in Colorado, although the property was in every reasonable sense within the state of New York, where the stocks, bonds and credits were kept, and that Colorado has an enforcible lien thereon by virtue of the taxing order. A suf-

ficient answer to this contention is that the judgment in suit imposes a personal liability only and enforces no lien. A further answer is that *mobilia sequuntur personam* is not an exclusive rule of universal application nor does it transfer property into the foreign from the domestic jurisdiction. It is a rule of convenience merely, permitting taxation at the domicile of the owner of personal property which may at the same time be subject to taxation where the property itself is permanently located. (*Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 22; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 206; *People ex rel. Hoyt* v. *Commissioner of Taxes,* 23 N. Y. 224, 227; *Maxwell* v. *Bugbee, supra.*) This state taxes the succession of personal property of non-residents according to the actual situs of the thing (*Matter of Romaine,* 127 N. Y. 80, 89) and our courts may not say that the assets of the estate are at the same time actually within and without the state of New York. The tangible *res* was, therefore, at all times in New York and not in Colorado.

"If these general and well-recognized principles of taxation are by any process of reasoning to be considered inapplicable to the collection of transfer taxes, a sufficient answer to the contention of the state of Colorado remains. When a statutory method of enforcing the collection of a tax is provided which requires judicial action before the liability of the taxpayer is finally fixed it is exclusive and must be followed. That it cannot be followed does not alter the case. The order which was entered in Colorado in the proceeding to fix the tax on notice by mail to defendants did not terminate a suit or controversy between parties and is not a judgment either *in personam* or *in rem.* (*People* v. *Kellogg,* 268 Ill. 489.) After the tax has been assessed by the preliminary order no person can be compelled to pay it until a citation issued out of a Colorado court having jurisdiction has been regularly served on him and he has had an opportunity to be heard. Unless this notice is given, the constitutional right to due process of law is invaded. (*Matter of McPherson,* 104 N. Y. 306, 321.) The Colorado statute thus provides (§§ 18, 19) for a proceeding to collect the tax, subsequent to the assessment, on notice to the persons interested in the property, in the nature of an action *in rem.* 'A statutory remedy

or proceeding cannot be enlarged by construction nor be made available or valid except by strictly following the directions of the act.' (*Matter of Maltbie* v. *Lobsitz Mills Co., supra,* p. 232; *Oakman* v. *Small,* 282 Ill. 360.)

"But it is urged that the right of the state of Colorado to maintain an action for the collection of the tax when the special remedy is ineffective, is upheld by its local laws (*Pinnacle G. M. Co.* v. *People,* 58 Col. 86); that the Colorado statute provides that the attorney-general may collect the tax in 'any other manner as may be provided in this act *or by law*' (Act of 1916, § 13). *i. e.,* by a common-law action. This contention also is unsound. The attempt to give such a statutory provision extraterritorial effect would conflict with another well-settled principle of private international law which precludes one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The rule is universally recognized that the revenue laws of one state have no force in another. The remedy is a part of the law and we are once more brought to face the doctrine that the taxing power of the state is by the federal Constitution limited to persons and property within its jurisdiction. (*Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265; *Marshall* v. *Sherman,* 148 N. Y., *supra,* pp. 24-26; *Loucks* v. *Standard Oil Co., supra,* p. 102; *Walker* v. *Treasurer, etc.,* 221 Mass. 600; *City of New York* v. *McLean, supra.*)"

Attempt is made by the petitioner to distinguish the *Harbeck* case in Point VII of his argument in the brief in support of the petition for a writ of certiorari, on the ground that it involved an extraterritorial imposition of the tax, which petitioner concedes would be contrary to well-established principles of constitutional and international law, but the petitioner argues that this extraterritorial imposition of tax is to be distinguished from an extraterritorial enforcement of tax. This attempt to distinguish between extraterritorial imposition and enforcement is developed at length in Point V of petitioner's brief. No authority is cited for this distinction and certainly there is no distinction in this case if such distinction can validly be made in any case. In the

opinion of Judge Manton in the Circuit Court of Appeals, it was said, with reference to this attempted distinction:

> "The appellant's argument that the extraterritorial imposition of tax is to be distinguished from the extraterritorial collection or enforcement of the tax, is without merit. The appellant attempted to impose a tax prior to the commencement of the action. The taxing authorities went through the forms prescribed by the statutes of Indiana, but Breed was dead before the assessment and the attempt was fruitless. The property was not physically there. Under the due process clause of the United States Constitution, Indiana had no jurisdiction to impose a tax because neither the property or the deceased was within its jurisdiction at the time the tax was assessed. It may not now use the national district court outside of the state to collect such tax" (Tr. p. 38).

This proceeding is repugnant to the same two principles stressed in the *Harbeck* case. The first of these is that under the due process clause of the United States Constitution, the State of Indiana had no jurisdiction to impose a tax because neither the defendants nor the property of the decedent, nor the decedent himself, were within the jurisdiction of the State of Indiana at the time the taxes were assessed. If they had been, the petitioner would not now be seeking the assistance of the United States courts outside of the State of Indiana. The other principle which bars this suit is the principle of private international law, as stated in the *Harbeck* case, which

> "* * * precludes one state from acting as collector of taxes for a sister state and from enforcing its penal or revenue laws as such."

The petitioner attempts in Point VII of his brief to impeach the authority of the *Harbeck* case. Without dwelling upon his analysis of that case at length, it is apparent that the only real difference between the cases is that in the *Harbeck* case the action was commenced in the New York State Court, while this action was commenced in the Fed-

eral Court sitting in New York, and that the action in the *Harbeck* case was to collect inheritance taxes, while this action is to collect personal property taxes. This difference in fact does not prevent the *Harbeck* case from being a square decision on the question by a court of high authority. At page 72 of the petitioner's brief the contention is made that the decision of this Court in *Blodgett* v. *Silberman,* 277 U. S. 1, overrules the *Harbeck* case. It is plain that this Court's decision in *Blodgett* v. *Silberman,* did not deal at all with the problem of extraterritorial enforcement of taxes. Referring to this contention with respect to the *Blodgett* case, the opinion of Judge Manton in the Circuit Court of Appeals states:

> "But it is said that *Blodgett* v. *Silverman,* 277 U. S. 1, overrules what is said in the *Harbeck* case. The *Blodgett* case did not deal with the question of extraterritorial enforcement of state tax statutes which is presented in this case. That case involved the question of whether the State of Connecticut could tax the transfer of certain intangible personal property under a will probated in Connecticut and collect the tax in a Connecticut court against executors appointed by the Connecticut Court of Probate. The deceased was domiciled in Connecticut at the time of his death. The court decided that intangible personalty has such a situs at the domicile of its owner and its transfer on his death may be taxed there. No question of jurisdiction of the State of Connecticut over the executors was presented. The decision in the *Blodgett* case was limited to upholding a transfer tax upon intangibles in a court which had jurisdiction to tax. That principle is recognized in the cases we have referred to.
>
> "Assuming Breed was domiciled in Indiana, as alleged in the complaint, the taxes were not assessed until after his death and until after the appellees were administering his estate in the jurisdiction of the New York Surrogate's Court. The amount of the tax had not been ascertained and no attempt was made to impose the taxes prior to death. The Indiana statute imposes a duty upon the resident to report taxable property. It creates no liability before the amount of taxes claimed is deter-

mined. It was necessary for the taxing authorities to assess the taxes and determine the amount claimed to be due. It is not a transfer tax or a succession tax claimed, but a personal property tax. The application of the fiction of *mobilia sequuntur personam* would require an assessment during each of the years for which taxes are claimed, during the lifetime of the decedent, to reach the conclusion that there was a personal liability to pay these taxes during his life. Jurisdiction is not to be founded upon a multiplication of fictions and in no true sense can it be said that Indiana had jurisdiction to impose the taxes for which this suit is brought." (Tr. pp. 38-39.)

The English courts have applied the same rule and have held that taxes due a colony are not to be collected outside of the colony. In *Municipal Council of Sydney* v. *Bull* (1909), 1 K. B. 7, an action was brought in England on behalf of the Municipal Council of the City of Sydney in the State of New South Wales, to collect the amount claimed from an owner of property in New South Wales for local improvements. The Court said, at page 12:

"Mr. Foote contends that this enactment enables an action to be brought in this country and makes the Courts of this country auxiliary to the Colonial Courts to this extent at all events, that whereas before the enactment this claim could not have been recovered by means of an action in the Colony, it is now recoverable not only there, but in this country also. Now, in my view, that was not the object or intention of the enactment. Its sole object and intention was to provide that within that area where the claim was recoverable it might be recovered by an action. It was urged that this is in its nature a transitory action. I do not think it is. Some limit must be placed upon the available means of enforcing the sumptuary laws enacted by foreign States for their own municipal purposes. But what restriction is to be imposed on such legislation if this claim could be put in suit in this country? It is true that the contribution which the Municipal Council of Sydney seeks to levy upon the defendant is a contribution in money, but it might be exacted in another form; the Colonial Legisla-

ture might have enacted that of those persons whose property had been improved one should plant trees, another should lay drains, and a third should sink wells and find water—provisions which under certain given circumstances might be as wise and equitable as the levy of a rate for contribution in money. Could the persons who omitted to perform these statutory obligations be sued in this country? Certainly not. And the mere fact that in New South Wales the contribution is a money contribution enforceable by action as well as by distress makes no difference. The action is in the nature of an action for a penalty or to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last-mentioned State."

The analogy between the proceeding in that case in a court of the Commonwealth sitting outside of the colony and the action in the present instance in a federal court sitting outside of Indiana, appears to be complete.

There are several other cases in the American courts where the question of extraterritorial enforcement of revenue laws has arisen and in these cases also the courts have without exception refused to permit extraterritorial enforcement of the revenue laws involved.

Matter of Anita Bliss, 121 Misc. 773 (New York County Surrogates' Court, 1923);

State of Maryland v. *Turner*, 75 Misc. 9 (New York Supreme Court, 1911);

State of Arkansas v. *Bowen*, 20 D. of C. Rep. 291 (District of Columbia Supreme Court, 1891).

See also:

Henry v. *Sargeant*, 13 N. H. 321, 332 (1843).

The petitioner claims that there is some basis for a distinction between criminal and penal laws on the one hand and revenue laws on the other, but the reason for the refusal to enforce all of such laws in another sovereignty is cogently

stated by Judge Learned Hand in his concurring opinion in the Circuit Court of Appeals in the present case:

> "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists in my judgment which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in foreign States if they run counter to the 'settled public policy' of its own State. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any rate, should be, beyond the powers of a court; it involves the relations between the States themselves with which courts have no power to deal and which are entrusted to other authorities. It may commit the domestic State to a position which would be of serious moment to the foreign State. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper." (Tr. p. 41.)

In connection with the petitioner's effort to show that revenue laws should be treated for this purpose as fundamentally different from penal and criminal laws, the petitioner cites *Tennessee* v. *Whitworth*, 117 U. S. 129, *Supervisors* v. *Rogers*, 7 Wall. 175, and *In re Stutsman County*, 88 Fed. 337, but none of these cases lends any support to the petitioner's contentions. In *Tennessee* v. *Whitworth*, the suit was removed to the Federal Court on the ground that the suit was one arising under the Constitution of the United States and the question of jurisdiction does not appear to have been raised in the Federal Court. In *Supervisors* v.

Rogers, the Circuit Court from which the appeal was taken had adopted the state practice with reference to executions, as it was clearly authorized to do, and for that reason this Court affirmed the decision of the Circuit Court, without considering any other jurisdictional question. In *In re Stutsman County*, it was decided that an action to collect taxes could be removed by the defendants on the ground of diversity of citizenship. Not one of these cases involved any question of constitutional or international law in connection with an attempt to impose or collect taxes in federal courts outside the taxing state. It is clear that there is a fundamental distinction between the duties and powers of a federal court in the taxing state and one sitting elsewhere, yet the petitioner has cited no case holding squarely that federal courts may be properly used for the collection of taxes even if the action is brought in the taxing state. The cases which the petitioner has cited did not require or involve any decision on this point.

The disinclination of federal courts to interfere in any way with the revenue laws and the collection of taxes of or for states or political sub-divisions thereof, is shown in such decisions as *Heine* v. *The Levee Commissioners*, 86 U. S. 655, and *Rees* v. *City of Watertown*, 86 U. S. 107.

The petitioner seeks, at some length, in Point IV of his brief, to show that under the statutes of Indiana the taxes which are sought to be collected in this action were personal obligations in each year, whether or not the amount had been fixed by assessment. None of the statutes or decisions of Indiana could have any extraterritorial effect in the present case. The property of the decedent was not actually in Indiana during any of the years for which taxes were sought to be imposed, the taxes were not assessed until after the death of decedent and neither the decedent nor the respondents were within the State of Indiana when the taxes were actually assessed. The Circuit Court of Appeals properly held that under these circumstances the attempt to assess the taxes was fruitless. But even if the statutes of Indiana

created a liability, there would still remain the fundamental question as to whether or not such liability could be enforced in a federal court in New York, and it is plain that the District Court and the Circuit Court of Appeals properly held that it could not be.

In Point VI of the petitioner's brief, it is contended that there is a fundamental distinction between the conception of tax liability entertained by federal courts and the conception entertained by the courts of some of the states. To establish this proposition, the petitioner cites various decisions relating to the collection of federal taxes in federal courts. Obviously these have no application to the present problem. The fact that in federal courts under federal statutes the Federal Government is permitted to maintain an action for taxes, whether in the form of an action of debt or in some other form, does not furnish any authority for the present action or indicate in any way that in a federal court the liability to pay taxes to a state outside of the state in which it is sitting permits the maintenance of an action of debt or any other kind of an action.

If it should be held that the states and political subdivisions of the states are not limited to the collection of taxes from property or persons within their jurisdiction, and that they may apply to the Federal Court in any district where personal jurisdiction of the taxpayer can be obtained, then the protection afforded by the due process clause of the Federal Constitution and by such cases as *Pennoyer* v. *Neff*, 95 U. S. 714, would be removed.

It is for the removal of this protection and the opening of the Federal Courts to states and their political sub-divisions, unable or unwilling to collect their revenues through the orderly process of their own courts, that the petitioner contends upon this application. We respectfully submit that this proposal as applied to the present case does not require a review by this Court of the salutary and established principles forbidding extraterritorial collection of revenue.

POINT III.

The petition for a writ of certiorari should be denied with costs.

Respectfully submitted,

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